

STATE OF MICHIGAN
COURT OF APPEALS

JAMES J. STOPS,

Plaintiff-Appellant,

v

CHARTER TOWNSHIP OF WATERSMEET,

Defendant-Appellee.

UNPUBLISHED

June 14, 2007

No. 272570

Gogebic Circuit Court

LC No. 05-000258-CZ

Before: Schuette, P.J., and O'Connell and Davis, JJ.

PER CURIAM.

In this appeal, which involves plaintiff's challenge to the enforceability of defendant's dock restriction zoning ordinance, plaintiff appeals as of right from a circuit court order granting defendant summary disposition under MCR 2.116(C)(7) and (10). We affirm.

I. FACTS

On August 14, 2003, plaintiff, who owned real property on Fish Hawk Lake, applied to defendant's zoning administrator for permission to construct a 45-foot dock. On August 18, 2003, the zoning administrator denied the application on the basis that the proposed dock would violate § 5.04C of defendant's ordinance, which was adopted on July 16, 2003, and which restricted permissible dock length to 40 feet from the shoreline.

On August 22, 2005, plaintiff filed suit, seeking a declaration that defendant's ordinance was invalid as a matter of law and that plaintiff was entitled to issuance of the dock certificate for which he had applied. Plaintiff further alleged a substantive due process violation, challenging the ordinance as unreasonable and asserting that it constitutes an arbitrary and capricious exclusion of a legitimate land use and does not promote the public health, safety, or general welfare.

The parties filed cross-motions for summary disposition. Plaintiff maintained that because defendant's publication of notice of its adoption of § 5.04C was untimely, that section was invalid and unenforceable as a matter of law. Alternatively, plaintiff argued that the seven-day post-publication waiting period in MCL 125.281 undisputedly would not have ended until August 24, 2003, and the zoning administrator thus unlawfully rejected plaintiff's application. Finally, plaintiff alleged that § 5.04C violated his substantive due process rights. Conversely, defendant asserted that it was entitled to summary disposition under MCR 2.116(C)(10), because

§ 5.04C was lawfully enacted and any allegedly tardy published notice of adoption standing alone was not fatal to the provision, and because § 5.04 satisfied substantive due process safeguards. Defendant also argued that plaintiff's complaint was barred by either the applicable statute of limitations or res judicata under MCR 2.116(C)(7).

On June 27, 2006, the circuit court heard oral arguments on the parties' cross-motions and granted defendant's motion for summary disposition under MCR 2.116(C)(7) and (C)(10). The circuit court concluded that plaintiff's complaint was time-barred, and it rejected plaintiff's challenges to the validity of § 5.04C. Plaintiff now appeals.

II. STANDARD OF REVIEW

Although the circuit court granted defendant summary disposition in part under MCR 2.116(C)(7) (period of limitation), the correct subrule is (C)(4) (lack of jurisdiction), under which a similar standard of review applies. *Wickings v Arctic Enterprises, Inc.*, 244 Mich App 125, 147; 624 NW2d 197 (2000) (observing that an order granting summary disposition under an incorrect subrule may be reviewed under the correct rule). "We review jurisdictional questions under MCR 2.116(C)(4) de novo, and in doing so we must determine whether the affidavits, together with the pleadings, depositions, admissions, and documentary evidence, demonstrate . . . [a lack of] subject matter jurisdiction." *L & L Wine & Liquor Corp v Michigan Liquor Control Comm.*, ___ Mich App ___, ___ NW2d ___ (Docket No. 271942, issued February 22, 2007), slip op at 2 (internal citation and quotation omitted) (omission and alteration in original), citing MCR 2.116(G)(5).

III. ANALYSIS

We initially note that the issues raised in this appeal involve various provisions of the township zoning act, MCL 125.271 *et seq.*, which was repealed by 2006 PA 110, effective July 1, 2006, three days after the summary disposition hearing occurred. The repealed act's provisions still apply in this case, however, because the Legislature provided that the repeal "shall not be construed to alter, limit, void, affect, or abate any pending litigation, administrative proceeding, or appeal that existed on the effective date of this act or any ordinance, order, permit, or decision that was based on the acts repealed by this section." MCL 125.3702(2).

Relevant to this appeal, the township zoning act vested a zoning board of appeals with authority to review and rule on "any order, requirement, decision, or determination made by an administrative official . . . charged with enforcement of an ordinance," MCL 125.290(1), including the power "to grant a variance in the ordinance." MCL 125.290(2). The Legislature afforded to persons "having an interest affected by the zoning ordinance" the right to appeal a decision of the zoning board of appeals to the circuit court, which would "review the record and decision of the board of appeals to insure that the decision . . . (a) [c]omplies with the constitution and laws of the state," "(b) [i]s based upon proper procedure," "(c) [i]s supported by competent, material, and substantial evidence on the record," and "(d) [r]epresents the reasonable exercise of discretion granted by law to the board of appeals." MCL 125.293a(1). Because § 23a set forth no specific period for an appeal from the zoning board of appeals, the 21-day period in MCR 7.101(B)(1)(a) governed such appeals of right to the circuit court. *Krohn v Saginaw*, 175 Mich App 193, 196; 437 NW2d 260 (1988).

Plaintiff undisputedly failed to pursue an appeal to the circuit court of defendant's zoning board/planning commission's October 1, 2003, denial of his request for a variance. In this appeal, the parties argue concerning the propriety of plaintiff's commencement of this action challenging the validity of defendant's Ordinance § 5.04C, focusing their arguments on two published decisions of this Court.

Defendant relies on *Krohn*, *supra* at 195, in which the plaintiff sought to contest a July 22, 1986, decision of the defendant's planning commission granting a variance to Action Auto, Inc. The plaintiff filed a complaint challenging the planning commission's decision on September 18, 1986, but the circuit court dismissed the action as untimely filed more than 21 days after entry of the planning commission's final decision. *Id.* On appeal, this Court initially affirmed the circuit court's finding that the plaintiff had failed to timely pursue an appeal to the circuit court within the 21-day period afforded by MCR 7.101(B)(1), and, therefore, held that the circuit court "did not possess subject matter jurisdiction over the cause." *Id.* at 195-196. The Court also found "it . . . necessary to briefly consider [the] plaintiffs' argument that counts II through V of their complaint should not have been dismissed because they represented different causes of action not covered by the twenty-one-day appeal period provided by MCR 7.101." *Id.* at 197. With respect to the complaint's constitutional allegations, this Court provided the following analysis:

Count III of [the] plaintiffs' complaint alleged that their state and federal due process rights were violated and that their property had been taken without just compensation as protected by the state constitution. Count IV of the complaint alleged that the planning commission action allowed an unpermitted illegal use of the subject site and constituted a nuisance per se. Lastly, Count V of the complaint asked for a declaration of the parties' rights with reference to the intended construction. *With respect to each of these counts, we believe that they all raise issues relative to the decision of the planning commission and the procedures employed by the planning commission in reaching that decision. Thus, they do not establish separate causes of action, but merely address alleged defects in the methods employed by the planning commission or the result reached by the commission. Accordingly, those are issues to be raised in an appeal from the decision of the planning commission. Since [the] plaintiffs were tardy in claiming their appeal, those counts were properly dismissed. [Id. at 198 (emphasis added).]*

In support of the proposition that the complaint contains allegations not subject to appeal to defendant's planning commission, plaintiff relies on a subsequent case, *Sun Communities v Leroy Twp*, 241 Mich App 665; 617 NW2d 42 (2000). In *Sun Communities*, the defendant's zoning board denied the plaintiff's application for rezoning. *Id.* at 666-667. More than 2-1/2 months later, the plaintiff filed a complaint for injunctive and declaratory relief, which alleged, among other things, "a taking of private property without just compensation," "a violation of equal protection," "a violation of substantive due process," and exclusionary zoning. *Id.* at 667. Relying on *Krohn*, the circuit court granted the defendant's motion for summary disposition on the basis that it lacked subject matter jurisdiction to entertain the untimely complaint. *Sun Communities*, *supra* at 667-668. This Court initially distinguished between zoning board actions of administrative nature, like the granting of variances, "site-plan review and the approval of

special use permit requests,” and zoning board actions having a legislative quality, specifically, “the zoning and rezoning of property.” *Id.* at 669-670. The Court observed that although MCL 125.293a supplied an avenue for appeal of a zoning board’s administrative acts, “[n]owhere in this provision, or in any other provision of the TZA, is it mandated that a decision of a township board denying *a rezoning (a legislative act)* be appealed to the circuit court.” *Id.* at 670 (emphasis added). After the Court summarized the holding in *Krohn*, which it characterized as “challeng[ing] the administrative decision of the Saginaw Planning Commission to grant a special use permit and a variance,” the Court explained as follows that *Krohn* did not control the outcome in *Sun Communities*, *supra* at 672:

Krohn is factually distinguishable from the present case. Here, plaintiff’s lawsuit does not involve a challenge to the administrative activities of a municipal body acting in the capacity of a zoning board of appeals. Instead, it involves numerous constitutional challenges to the legislative actions of the township board in applying the AG zoning to plaintiff’s property. *There is no authority that requires a party to pursue an appeal to challenge the constitutionality of a legislative act of rezoning.* . . . [Emphasis added.]

This Court reversed the circuit court’s order because the “plaintiff was not required to pursue an appeal of the township’s decision to deny . . . [the] request for rezoning in order to challenge the constitutionality of the zoning ordinance.” *Id.*

We find this case more similar to *Krohn*, *supra* at 198. As in *Krohn*, and unlike *Sun Communities*, *supra* at 671-672, plaintiff’s complaint challenged an underlying administrative action of defendant’s zoning administrator and planning commission, specifically the denial of his application for a certificate to construct his proposed dock and a variance for this purpose. Plaintiff never requested a zoning or rezoning decision by defendant. Furthermore, plaintiff’s complaint plainly focuses on the alleged procedural defects that occurred with respect to the enactment of Ordinance § 5.04C. The procedural allegations and the few paragraphs characterizing the application of § 5.04C as an arbitrary and capricious violation of plaintiff’s due process rights “all raise issues relative to the decision of the [zoning administrator and] planning commission and the procedures employed by the [zoning administrator and] planning commission in reaching that decision.” *Krohn*, *supra* at 198. Because the allegations of the complaint, filed nearly two years after defendant’s administrative decision denying the dock construction certificate and variance, all raise issues regarding the propriety of defendant’s denial and the procedures by which it made the decision, “they do not establish separate causes of action.” *Id.* Given that plaintiff untimely sought to challenge defendant’s decision in the circuit court, the court correctly granted defendant summary disposition of the complaint, although the court should have granted summary disposition under MCR 2.116(C)(4) instead of subrule (C)(7). *Id.*¹

¹ In light of our conclusion, we decline to address plaintiff’s remaining issues on appeal.

Affirmed.

/s/ Bill Schuette
/s/ Peter D. O'Connell
/s/ Alton T. Davis